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12 August 2015

EBF response to the public consultation on Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and trade repositories

EBF position / response

PART I – Questions on elements of EMIR to be reviewed according to Article 85(1)(a)-(e)

1.1: CCP Liquidity

i. Is there a need for measures to facilitate the access of CCPs to central bank liquidity facilities?

The EBF believes –that access to central bank liquidity can be helpful in order to ensure liquidity for the members and their clients, in particular during times of market stress.

However we believe that access to central bank liquidity facilities should not be mandatory under EMIR, and should not be a pre-requisite for authorisation or recognition. A lack of access to central bank liquidity facilities should not be viewed as a proxy for a deficient liquidity risk framework. The management of liquidity risk encompasses many different tools, of which access to central bank liquidity facilities is but one.

ii. If your answer to i. is yes, what are the measures that should be considered and why?

CCP access to central bank liquidity would be a very welcome step, not only in times of stress but also in normal market conditions. This access should not be restricted to the CCPs with a banking license, as the increasing importance of CCPs means that not only those holding a banking license are of significance from a systemic perspective. CCPs currently rely on liquidity arrangements with commercial banks, which exposes them to the ability of the commercial banks to provide liquidity, including in particular on an intraday basis. Considering that in most cases the commercial banks providing CCP with liquidity are at the same time members of the CCP, there is potential for negative feedback in case any of the institutions is unable to meet its liquidity obligations. Given the systemic role that the CCPs have acquired following from the global OTC derivatives reform, it is essential for them to be as robust as possible. Access to central bank liquidity would be an important means to that end, and it would eliminate the need for CCPs to have highly secured arrangements for overnight cash deposits over at least 95% of the cash.

Moreover, central bank liquidity access would be of particular importance in case a CCP was facing non-default related liquidity problems. A central bank liquidity line would further protect CCP and its users from contagion, as it would only be reasonable not to spread the risk of an ailing CCP risk onto commercial liquidity providers and/or CCP members.

1.2 – Non-Financial Firms

(a) i. Are the clearing thresholds for non-hedging transactions (Article 11, Regulation (EU) No 149/2013) and the corresponding definition of contracts objectively measurable as reducing risks directly relating the commercial activity or treasury financing activity (Article 10, Regulation (EU) No 149/2013) adequately defined to capture those non- financial counterparties that should be deemed as systemically important?

With mandatory clearing for NFC not due to begin for some time, it is as yet unclear how clearing for these entities will work in practice. Regardless, the EBF continues to hold that primary responsibility for monitoring adherence to the threshold must sit with the NFC itself. The other counterparty is unable to determine whether the applicable thresholds have been reached and necessarily has to rely on information provided or representation given by the counterparty as to its EMIR status.

The EBF believes that foreign exchange derivatives entered into for payment purposes pursuant to the European Commission's proposed guidelines under MiFID II need to be considered as objectively reducing commercial risks.

A global level playing field should be ensured by ensuring a consistent interpretation of the G20commitments with regard to the inclusion of non-financial counterparties i.e. non-systematically important counterparties around the world.

In addition, the determination of EMIR status process is cumbersome. In order to provide for greater degree of certainty, it could be considered to establish a central register which collects the notification of NFC+.

ii. If your answer to question i. is no, what alternative methodology or thresholds could be considered to ensure that only systemically important non-financial counterparties are captured by higher requirements under EMIR?

The wider and threshold-free "end-user" exemption as in the Dodd-Frank rules would be more objective and easier to determine.

There is insufficient justification as to why one entity within a group breaching the threshold should mean that the whole group is upgraded to the new category. Normally most derivative transactions are done by one company within a group (triggering the threshold by itself) and all other group entities who may have for instance one derivative transaction outstanding would be impacted as well. This last category can hardly be seen as systemically important.

(b) Please explain your views on any elements of EMIR that you believe have created unintended consequences for non-financial counterparties? How could these be addressed?

Non-financial counterparties:

The EBF urges the European Commission remove all but the largest NFCs from the scope to EMIR's clearing, reporting and risk mitigation provisions.

The G20 obligation forming the basis of EMIR intended reduce systemic risk in the OTC derivatives market by mandating clearing for eligible OTC derivative trades, mitigate the risks posed by un-cleared OTC trades, and impose a reporting obligation for all OTC derivative transactions. They key consideration in this obligation is systemic – rarely do financial product end-users in the NFC space contribute significantly to systemic risk, as the inter-dealer market makes up the majority of trading in terms of numbers and notional exposure. Considering that for most of the NFCs being subject to EMIR is not only very difficult to understand but above all very challenging to implement, mostly where the transaction volume is very low (i.e. only a small number of currency or an interest rate hedging transactions in a year). In such cases the transactions even if aggregated across NFCs do not pose a systemic risk to the financial market. The imposition of EMIR obligations, in particular the reporting obligation, results in disproportionate burdens for these small NFCs which are not commensurate with the risk they pose. In addition, the cumbersome nature and cost of regulatory compliance works as a disincentive to use hedging as a risk mitigation instrument and may not be a wise policy for the economy that may face more risks overall.

In particular the following aspects of the EMIR requirements continue to be challenging and onerous for NFCs, especially smaller and medium sized NFCs, as well as non-undertakings (including third country equivalents):

(i) Reporting obligation
- The need to obtain and maintain an LEI for the term of the transaction (even if the counterparty in question is not subject to EMIR, i.e. as a third country counterparty or a non-undertaking, and it has only entered into a single transaction).
- The (two-sided) TR-reporting obligation
- The T+1 requirement.

(ii) Risk mitigation requirements: Timely confirmation

Small financial counterparties:

The EBF believes that the European Commission should prefer to go even further to also limit or better exclude small, low-trading volume non-banks qualifying as FCs that only use derivatives for hedging purposes from the clearing obligation. The application of this obligation is not justified for small non-bank FCs having very small trading volumes. The cumbersome nature and cost of regulatory compliance negatively impacts their hedging strategies, inducing the risk that even these financial counterparties will, for economic reasons, avoid hedging risks ancillary to their activities. This would increase the overall risk on the market, contrary to the aims of the G20. In practice, the applicability of the EMIR requirements to such FCs could be determined by reference to the same clearing threshold designed for NFCs.

Definition of derivative/scope:

The term derivative/OTC-derivative is not defined sufficiently clear and not applied uniformly across the EU. By relying on a MiFID reference the definition of the term derivative /OTC-derivative all of the existing uncertainties and unresolved issues regarding the interpretation of the definition have been imported into EMIR. Consequently, the material scope of the EMIR-obligations remains unclear in many respects. Practical examples are FX transactions and bond forwards. This alone is clearly a less than ideal situation. Even more concerning is the fact that to this day, the definition is applied very differently in the Member States which means that the same product may be qualified as a derivative in one jurisdiction (triggering EMIR obligations) and not as a derivative on another jurisdiction (not triggering EMIR obligations). This causes an inconsistency in respect of both FC and NFC entities, but it should be noted that it causes considerable confusion on the customer side, especially for NFCs, and of course results in an uneven playing field since NFCs in jurisdictions with a wider understanding of the definition are exposed to burdensome regulatory obligations which their competitors in jurisdictions with a different understanding do not have to comply with.

Third country entities:

The indirect extension of EMIR obligations, such as the risk mitigation requirements, to third-country NFCs which may not be subject to similar obligations under their regulatory regime has resulted in considerable operational burdens, where the regulatory requirements differ. This is exacerbated by the fact that the precise extraterritorial scope of EMIR's obligation is not always defined very clearly. The manner and extent to which the various EMIR obligations need to be applied in respect of third country counterparties which should therefore be reconsidered and re-focused. In this context, it would be helpful to introduce definitions for the various types of third country entities to be captured or not by the EMIR obligations (entities equivalent to FC, NFC+, NFC- and non-undertakings).

Frontloading:

The concept of frontloading for clearing has created commercial uncertainty in the market around the pricing of derivative transactions. Derivatives are priced differently when conducted on a bilateral basis versus a cleared basis. By introducing the concept of frontloading, EMIR has in effect mandated the closing out of bilateral derivative transactions to cleared transactions. This crystallises a position for the counterparty – which may be a loss – and creates a risk that they may not be able to enter into the same transaction on a cleared basis. This activity is potentially risk enhancing rather than risk mitigating and policy-makers have in part recognised this through their approach to the application of frontloading. We would welcome this but state that frontloading should be abolished as part of an EMIR review or at least maintained in its current form on a look-forward basis as in effect a soft launch of mandatory clearing.

Definition of undertaking:

The term undertaking/non-undertaking is not clearly defined. Currently, it follows only indirectly from the definition of the term NFC that non-undertakings (such as individuals or foundations or other entities which or not engaged in offering goods and services on the market) do not fall within the scope of the EMIR obligations. The Commission EMIR Q&A is helpful to some extent but as the concept of "undertaking" in European law is fairly broad and not clearly circumscribed it is difficult to apply in practice.

(c) Has EMIR impacted the use of, or access to, OTC derivatives by non- financial firms? Please provide evidence or specific examples of observed changes.

The challenges and cost associated with TR-reporting as well as the other elements mentioned in the response to question (b) above have had an impact on an NFC's access to OTC-derivatives used for hedging purposes and their hedging cost. The following factors have proven to be particularly challenging:

- The two sided nature of the reporting obligation.
- The need to obtain and maintain an LEI for the term of the transactions (even if the counterparty in question is not subject to EMIR, i.e. as a third country counterparty or a non-undertaking, and it has only entered into a single transaction).
- The T+1 requirement
- The lack of a threshold on reportable transactions, particularly in the FX forwards area.

As the European Commission would be aware, the quantity of data required to meet the trade reporting obligation can prove considerably onerous for NFCs. This is exacerbated by the lack of consistency regarding data inputs between trade repositories in the market. The development of trade reporting solutions for new products is time consuming and expensive thereby resulting in a slower and less flexible customer hedging proposition.

Finally, regulatory capital requirements and the treatment of OTC derivatives has impacted their use. This is because: clearing is exempted from the leverage ratio rules under CRR/CRD 4, however bilateral trading (with margin requirements) is not exempted. In addition when transactions are cleared through a clearing broker, the connected transactions between the clearing member and the client (principal-to-principal model) are also not exempted from the leverage ratio requirements. This directly affects clearing cost for clients and access to clearing services for clients (as many clearing members may elect to limit clearing services).

1.3 – CCP Colleges

(a) What are your views on the functioning of supervisory colleges for CCPs?

Exchange of information between authorities is of essence. From the EBF perspective, CCP colleges appear to be conducive to such dialogue between home and host authorities.

However we would like to highlight the following:

- Lack of transparency - market participants are unable to reach an informed view on the effectiveness of the functioning of supervisory colleges for CCPs
- We believe at a minimum it should be possible to provide greater clarity regarding timetables for CCP authorisation, third country CCP recognition and extensions of activities and services.
- Transparency over the authorisation process and time table is essential to enable clearing members and other market participants to strategically plan their future business offerings and build the necessary processes and functionality to meet the requirements.
- Article 17 prescribes timeframes for the competent authority to inform the CCP whether the authorisation application has been granted or refused, however the 6 month period for a decision to be taken does not commence until a complete application has been received. Whilst EMIR prescribes a 30 day period for the NCA to determine if the application is complete, in practice NCA's and CCPs may engage in detailed requests for information before that is reached. As such, it is therefore very difficult for other market participants to understand when a decision on CCP authorization may be reached as the 6 month deadline can in practice be significantly extended if an additional, or potentially multiple additional information requests are made to the CCP.
- EMIR Article 15 sets out the process for a CCP to seek to extend its authorisation to cover additional services or activities not covered by the original authorisation. There is a lack of clarity as to what constitutes "additional services or activities" as this is not defined in EMIR. It is therefore unclear exactly what type and materiality of changes to a CCP's operations necessitates a formal additional authorisation under Article 15. As such, the EBF recommends that that a non-exhaustive list of guiding principles could be added to EMIR to make clearer the types of changes to activities and services that would be captured under Article 15.

(b) What issues have you identified with respect to the college system during the authorisation process for EU CCPs, if any? How could these be addressed?

1.4 – Procyclicality

(a) i. Are the requirements under Article 41 EMIR and Article 28 Regulation (EU) No 153/2013 adequate to limit procyclical effects on CCPs' financial resources?

The EBF believes that the European Commission should strengthen the margin requirements to better address the risk of procyclical effects on CCPs financial resources. It should do this by:

- Improving access to clearing by including not only cash but other instruments as eligible collateral instruments. Eligible assets should be of high credit quality, liquid and characterised by low volatility. If CCPs have direct access to liquidity from central banks, they should be able to "transform" financial instruments received as collateral with cash.

The repo markets should remain for all parties a viable instrument to transform collateral and to ensure for liquidity.

- Margin floor should be implemented so as to ensure that during stable market conditions, margins collected by CCPs do not fall to questionable levels.

ii. If your answer to i. is no, how could they be improved?

Please refer to our answer above

(b) i. Is there a need to define additional capacity for authorities to intervene in this area?

We believe that the authorities' first priority should be to improve transparency around the authorisation process in general.

Overall we do not see the need for more supervisory intervention in this context. The role of the supervisors is to assess CCPs' internal risk management procedures and to approve the methodologies used. CCPs should remain responsible for the construction and application of their risk management process, on the basis of the existing minimum requirements established by EMIR.

ii. If your answer to i. is yes, what measures for intervention should be considered and why?

The EBF advocates for a solid, transparent and workable recovery and resolution procedures. A proposal for recovery and resolution regime for central counterparties should therefore be delivered shortly so to minimize the potential risks mandatory clearing might pose in the future.

The following criteria must be taken into account when recovery and resolution measures are proposed:

- A forthcoming legislation on this field has to provide a strong legal base and should be clear, transparent and workable. It is the opinion of EBF that recovery and resolution rules should have a very high degree of legal certainty. It is also important to have a clear distinction between the different phases (ordinary procedures risk management, recovery and resolution). In particular, the criteria for entry into resolution and for who will take that decision need to be well identified.

- The forthcoming legislation should also take into account that CCPs differ from banks in a number of ways. For example, CCPs are not leveraged and do not actively take on risk.

- The recovery tools should be transparent and designed to allow those who would bear losses and liquidity shortfalls to measure, manage and control their potential losses and liquidity shortfalls. There should be no unlimited exposures for clearing members, indirect participants or clients. In short the liabilities of clearing members of the CCP must be predictable and limited. In order to preserve simplicity and workability of recovery and resolution measures, at least clients and indirect clients should not be addressed by the requirements at all.

- The forthcoming proposal has to be flexible enough to cover both different business models of CCPs as well as different risk-profiles with different instruments (one size does not fit all -approach).

1.5 – CCP Margins and Collateral

(a) i. Have CCPs' policies on collateral and margin developed in a balanced and effective way?

Eligible collateral should be characterised of being of a high credit quality, conducive to swift liquidation, resistant to market volatility, and of low correlation with the underlying trade. Measured against these standards, the EBF believes that EMIR's eligible collateral standards are appropriate

Concerning margin methodologies, more transparency from the CCPs towards users is needed to enable the latter to correctly assess the risks towards the CCP and towards the clearing clients. At present, in the derivatives sphere, clearing members are not always able to reconstruct the actual levels of exposures towards their clients on the basis of the information and the margin calls received form the CCPs. This is particularly the case for positions held in net omnibus accounts at CCP level, but remains a valid issue for gross omnibus accounts as well.

Similarly for the contributions to the CCP default fund, more transparency towards users would be commendable, in particular concerning the nature of the exposures represented by the two largest clearing members, as well as concentration limits for assets accepted by the CCP for the Default Fund contributions. This would allow the clearing members to better assess and anticipate their own risk level related to the CCP risk not covered by the margins (effectively the no-covered market risk) and to plan better for the contributions to the DF.

ii. If your answer to i. is no, for what reasons? How could they be improved?

(b) i. Is the spectrum of eligible collateral appropriate to strike the right balance between the liquidity needs of the CCP and its participants?

No.

ii. If your answer to i. is no, for what reasons? How could it be improved?

Bank guarantees play an important, traditional role for client clearing especially in the energy markets where non-financial counterparties regardless of their size have cleared their trades centrally for over a decade. The cumbersome requirements and the interim phase-in for bank guarantees placed in the RTSs will de facto drive these companies away from their risk-reducing central clearing models in the future.

PART II – General Questions

2.1 – Definition and Scope

i. Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?

Yes.

ii If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

- Personal scope/undertakings:

As stated above, the concept of undertaking is not defined in EMIR; rather, the European Commission has in its Q&A based its interpretation of the concept on a European Court of Justice ruling. As such, any entity that performs economic activity in the EU is considered an undertaking, and will be subject to EMIR; this could extend to natural persons acting on behalf of their business, but not incorporated as such. The concept of undertaking is of such importance that it should be clearly defined in level 1 legislation and clearly not in non-binding question and answers from the Commission or ESMA.

Although the regulation does not apply to individuals and non-undertakings, in certain cases they have nevertheless been affected by the regulation, as, for example, for FC to comply with the reporting requirement, these need to provide information on contracts and, in the case of individuals, personal date and in the case of non-undertakings, where available, an LEI. It should therefore be made clear that individuals are not in scope for the purpose of the EMIR obligations and as noted in Section 1.2(b), there needs to be a definition of "undertaking" so as to avoid any confusion determining when EMIR applies.

Article 2(9) of EMIR contains the negative definition of a "non-financial counterparty", which has created some doubts as to whether certain types of one-person businesses (i.e. businesses which are often not conducted via a legal entity) and various public institutions fall within the scope of EMIR. The answers in Section II 14 & 15 in the Commission Q&A have unfortunately not removed these uncertainties and it would be helpful if the definition in EMIR of a "non-financial counterparty" could be revised to remove these uncertainties.

- Treatment of public sector entities:

Regarding the exemption in relation to public entities, it is very difficult to know whether an entity is falling under this exemption, especially when they are established in another EU country.

- AIFMs:

Regarding the Article 2(8) definition of financial counterparty, alternative investment funds will be classified as FCs if they are managed by AIFMs which are authorised or registered in accordance with AIFMD. For example the requirements of central clearing, obligatory exchange of collateral and to mark-to-market the value of their outstanding contracts on a daily basis are not well suited for these smaller AIFMs. These burdensome EMIR requirements therefore hinder smaller funding initiatives in the market. The EMIR requirements for non- financial counterparties below the clearing threshold are better suited for these smaller AIFs. Therefore we propose the delete registered AIFMs in the definition of financial counterparty in article 2 paragraph 8 of EMIR.

- Derivatives definition/material scope:

The definition of derivative/OTC derivative is not defined in sufficiently clear manner and, more importantly, is not applied uniformly across the EU. By relying on a MiFID reference the definition of the term derivative /OTC-derivative all of the existing uncertainties and unresolved issues regarding the interpretation of the definition have been imported into EMIR. Consequently, the material scope of the EMIR-obligations remains unclear in many respects. Practical examples are FX transactions and bond forwards or the treatment of options. This alone is clearly a less than ideal situation. Even more concerning is the fact that to this day, the definition is applied very differently in the Member States which means that the same product may be qualified as a derivative in one jurisdiction (triggering EMIR obligations) and not as a derivative on another jurisdiction (not triggering EMIR obligations). This causes considerable confusion on the customer side, especially for NFCs, and of course results in an uneven playing field since NFCs in jurisdictions with a wider understanding of the definition are exposed to burdensome regulatory obligations which their competitors in jurisdictions with a different understanding do not have to comply with. Please see also our comments above to section 1.2.

A uniform application of the definition of derivatives across all member states for the purposes of EMIR is essential to ensure a consistent and functioning regulatory framework. To this end, it would either be necessary to introduce an EMIR-specific derivatives definition, to have a fast-track procedure for the Commission to respond to and address these concerns, or to enable ESMA to provide legally-binding guidance on such issues.

In this context it is particularly important to safeguard that the definition of derivatives for the purposes of EMIR only captures instruments which are intended to and can actually be addressed by the EMIR obligations. One example for instruments which should not be covered by the EMIR-derivatives definition are the so called embedded derivatives where these also qualify a securities. The EMIR-obligations are not designed to cover securities, rather they are meant and structured to address contractual transactions and it would therefore be impossible to subject securities to the same procedures and measures which cover such derivative transactions.

- Third country equivalence:

Despite the reference to the third party equivalence regime, there are still very few equivalence decisions and delegated acts for the third country entities. The wide network of the equivalence decisions is a precondition for well-functioning international derivatives markets. The absence of equivalence regime creates legal uncertainty and causes concerns when trading with third country entities. Please also see our response to Section 2.6.

The EBF believes that non-EU bodies that are involved in the management of public debt (including non-EU central banks) should be excluded from the scope of EMIR and urge the European Commission to extend the exemption allowed under Article 1(6) of EMIR to third country central banks as the necessary delegated acts have only been made in respect of Japan and the United States. Furthermore, with the exception of the reporting obligation, EMIR should not apply to non-EU public sector entities captured within the meaning of Article 4 (8) of Regulation 575/2013 if these entities are established in the EU and are owned by central governments, and if they have an explicit guarantee arrangement provided by central governments.

2.2 – Clearing Obligations

(a) i. With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

Yes.

ii If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

The liquidity/centralisation via clearing versus the bilateral world means a centralisation of risks not only with a small number of CCPs but also with a small number of clearing brokers.

Indirect clearing:

Many smaller counterparties are not clearing members and use a clearing broker model to gain access to clearing houses. Currently there is no indirect clearing offering for Financial Counterparty customers of institutions who use clearing brokers, nor does it appear that there will be such an offering going forward.

Indirect clearing of OTC derivatives in the sense of clearing services provided by a clearing member for the customers of a client (effectively with two intermediaries) poses very considerable legal challenges of which there are currently no viable solutions, in particular regarding the segregation requirements existing under Art. 39 EMIR. In particular individual segregation is difficult if not impossible to implement in an operationally effective manner and consistent with applicable laws, including insolvency laws. Offering indirect clearing services can therefore only be optional and not mandatory, with any move towards mandatory clearing likely to result in an even further reduction in the number of firms willing to be becoming clearing members.

The disclosure of clearing costs to EMIR clients as mentioned in Article 38, paragraph 1 has more to do with investor protection rather than infrastructure. In addition this article is not limited to derivatives but to all financial instruments and also to retail clients (under the MiFID definitions). For these reasons we propose to include necessary cost disclosure in the MIFID II requirements instead of EMIR. This also prevents a fragmented approach.

Access to clearing (client clearing):

Access to clearing has proven to be difficult for market participants with only a small portfolio of trades as it is not economically viable for clearing members to accept such clients.

Impact of Leverage Ratio:

Many market participants including smaller banks can only observe the clearing obligation through client clearing, that is, as clients of Clearing Members (CMs). However the delay in final implementation of mandatory clearing and the negative effects of client clearing on CMs under existing capital requirements (in particular leverage ratio) has had an impact on the ability and willingness of CMs to offer client clearing and of, course, also affected pricing structures.

Frontloading:

The frontloading requirements will lead to legal uncertainties, inconsistencies, pricing issues and monitoring/operational issues (IT setup, etc.). The frontloading requirement is irrelevant for systemic purposes (specifically not frontloading transactions will have no material effect on the overall systemic risks). The requirement should therefore be removed for subsequent asset classes.

Product fragmentation:

There is a high fragmentation of products cleared on various CCPs in Europe as well as what regards clearing members´ offering. Since the clearing mandate covers various asset classes and currencies, which cannot all be cleared via a single CCP via a single clearing member, the market participants have to seek access to multiple CCPs via multiple clearing members. This has proven to be very burdensome and operationally challenging to all market participants.

(b) i. Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

Yes.

ii If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

The necessary authorisation/recognition should take place in sufficient time before the relevant RTS are published to ensure market participants have an ample timeframe within which to get their clearing arrangements established.

There is a trade-off between the benefits of competition and a reduction in the concentration of risk when multiple CCPs are authorised to clear an asset class versus the costs of clearing members having to connect to multiple CCPs which may increase the costs of clearing of all market participants. We do not feel there is an ideal number of CCPs that need to be able to clear a given asset class before the clearing obligation should apply; the Commission should not impose a clearing obligation on an asset class unless the operational and risk frameworks of the existing CCPs is fit for purpose so that the full volume of trades in the given asset class can be appropriately risk managed. There needs to be a critical mass of clearing members before a clearing obligation should be applied to a product. In particular, this is necessary to ensure there are sufficient entities participating in the default management process of a relevant CCP so that there is an appropriate level of risk mutualisation.

There is some concern that the liquidity may be insufficient in the beginning. This underscores the need to provide for an efficient and speeds "de-listing" process where the liquidity for a certain product which has been subjected to the clearing obligation and is no longer sufficiently liquid to support clearing.

The access to clearing has proved very difficult if not impossible where a small portfolio of trades subject to clearing mandate is to be cleared. It is not economically viable for clearing members to accept clients with a small portfolio. The compliance with clearing mandate may therefore prove impossible, with the effect of ceasing to trade the relevant asset class. Indeed, while an institution may trade and directly clear big IRS volumes, it may have a very small credit derivatives portfolio, mostly for hedging purposes, without existing clearing arrangements in place. In such case, it may be difficult and time consuming to find a clearing member willing to accept clearing the small portfolio. It may also prove too costly and cumbersome to put in place the infrastructure required to establish the new clearing connectivity for a very small trade population.

The current phase-in timing has been a concern for some financial institutions to the extent that they would be subject to the clearing mandate with respect to all asset classes in the first phase-in round (i.e. within 6 months after the RTS) as soon as they are direct clearing members for one of the mandated asset classes. A grouping approach adopted by ESMA in its last consultation for clearing of "EEA" currencies is welcome. But the class by class/currency by currency approach would be more adapted since the ability to clear one currency does not necessarily presume an existing access to clearing in another currency of the same group. It may therefore require a longer time to access clearing in a specific currency/product even for institutions used to the clearing framework.

The client clearing is taking time to kick off due to the delays in final RTS on clearing IRS and credit derivatives and uncertainty as to the scope and implementation dates of the mandate. Many clearing members have been working on the client clearing offering but have difficulties to onboard clients who mostly and naturally have adopted “a wait and see approach”. We expect bottleneck difficulties in the future onboarding when the clearing mandate is finalized. The fact that the clearing mandate is phased-in by 12/18 months for the FCs is not of much help due to the frontloading kicking in as soon as 5 months after the rules are adopted. In practice, this will be the deadline for having the clearing arrangements in place as many will like to avoid frontloading and will refuse bilateral trades subject to clearing mandate from the beginning of the frontloading period.

The legal framework for the protection of client positions and CCPs in the case of a default of a clearing member needs to be strengthened and harmonised throughout the EU. Current experience that national insolvency laws differ significantly and that legal uncertainties exist in some jurisdictions in relation to the effectiveness of protection measures in relation to client positions (porting of positions) We also refer to our comments on the need for a greater harmonisation an strengthening of the legal protection of netting agreements.

One additional suggestion would be that requirement under EMIR and Basel III could be aligned with regard to clearing obligation and that CMs could apply a more beneficial Leverage Ratio to this aspect of their business.

2.3 – Trade Reporting

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

As already mentioned above, the challenges and cost associated with TR-reporting have proven to be very challenging for all counterparties but especially for smaller and medium sized counterparties.

Against this background, some EBF members propose a change to a one-sided reporting obligation. This is in line with the U.S. principles under the Dodd Frank Act Title VII which entail a one-leg reporting obligation solely. This would result in less burden for non-financial counterparties under the threshold without impairing the transparency objectives and would ensure a global level playing field. This would also make it easier to align the EMIR reporting to the MIFID reporting, because the MIFID reporting is limited to investment firms. Article 9 of EMIR could be focused on financial counterparties and CCPs. Non-financial counterparties (at least under the threshold) could be left out.

Other EBF members disagree with the proposal to move to single-sided reporting. They see the problems with reporting mainly in the data quality and validation, and not in the fact that two legs are reported as such.

Regardless of the ultimate position which is taken, the EBF believes that the trade reporting obligation should be amended to reflect the fundamental differences between exchange traded derivatives, and OTC derivatives. In order to accurately capture to characteristics of each the EBF explicitly recommends that the European Commission adopt the following reforms:

- With regards to ETD reporting, the EBF recommends the complete removal of ETD transactions from the EMIR reporting obligation. Should that not occur, ETD reporting should move to a single-sided position reporting regime.

- Irrespective of the design of the reporting regime, the reporting obligation should not apply to intragroup transactions for all non-financial counterparties;

- Irrespective of the design of the reporting regime, the reporting obligation should not apply to NFC minuses.

LEI:

From the current EMIR requirements, non-financial counterparties under the threshold (and non-undertakings) have experienced the LEI as a burdensome and costly requirement. For these counterparties different alternative solutions could be applied which would preserve and facilitate the transparency requirements: Exemption from the reporting requirements or at least the LEI requirement (reliance on internal codes or BIC codes instead).

The need to obtain and maintain an LEI for the term of the transactions is burdensome for counterparties as they rely on the other counterparty to maintain its LEI over the term of the transaction, and depend upon prompt notification of the other party of any changes relating to the LEI.

The cost to maintain the LEI code is burdensome for many entities in and outside the EU. Some entities have one outstanding derivative transaction for instance for 15 years and should therefore maintain their LEI code during the whole maturity of that one deal. LEIs need to be renewed on an annual basis. If the counterpart does not renew their LEI, the status of their LEI will change to "lapsed" with the Local Operating Unit (LOU) at the end of the anniversary business day or the next business day, if the anniversary falls on a weekend. In cases where a bank is providing a trade reporting service for their customers, they will be unaware of the change in LEI status, and will continue reporting their trades quoting the lapsed LEI. In this case, an issue will arise as the reporting bank are not advised that LEI have lapsed and therefore, will not be alerted to amend their static data accordingly.

The reporting services from Trade Repositories and reconciliation between different Trade Repositories have proven not to be as efficient as it should have been. In addition, the services provided by Trade Repositories are costly and subject to unilateral amendments as directed by Trade Repositories.

The reporting obligations for listed derivatives (on a regulated market, MTF or OTF) should not apply under EMIR. This obligation should enter into force under MiFID II/MiFIR.

There remain a number of industry wide issues around the data requirements. A significant impediment is the lack of clarity around certain ESMA data fields which in turn is a significant impediment to trade matching.

Currently there is no process in place to exchange the UTI data between the clearing broker and the electronic confirmations platform.

Some standards have not yet been stabilized since Feb2014, which means increased IT cost as well as delays on reporting to meet new RTS.

In addition, as already mentioned in some of the previous responses, the following aspects have proven to be very challenging:
- The T+1 requirement
- The lack of a threshold on reportable, particularly in the FX forwards area. .
- The quantity of data required for Trade Reporting is very onerous. There is a lack of consistency regarding data requirements between Trade Repositories in the market. The development of Trade Reporting solutions for new products is time consuming and expensive thereby resulting in a slower and less flexible customer hedging proposition.

2.4 – Risk Mitigation techniques

i. Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

Timely Confirmation: It has proven to be a significant challenge to comply with the T+1 deadline for derivative trades that are not confirmed via electronic means, in particular with regard to equity and commodity derivatives where non electronic confirmations are still very prevalent and is often practically impossible to observe the time limits. However, in many cases the trade volume of counterparties does not merit the introduction of electronic confirmation systems so that counterparties will still need to continue to rely on non-electronic means. We therefore call for the T+1 timeframe currently used to be considered in terms of despatching the confirmation to the counterparty and not the deadline within which formal agreement has to be reached.

In practice it may sometimes be helpful to rely on negative affirmation of trades in order to meet the confirmation deadlines. However not all counterparties wish to accept the use of negative affirmation. In addition it may not always be appropriate or possible (i.e. for legal reasons) to rely on negative affirmation. This needs to be taken into consideration when comparing statistical data on “late” confirmations

Intragroup transactions: The risk mitigation requirements are instrumental to counterparties in a transaction because of their opposite risks and interests. In case of intragroup transactions as meant in EMIR however the risks are mutualised. Therefore also the other risk mitigation requirements (confirmation, reconciliation, compression and dispute resolution) are not necessary in a group context. The intragroup exemptions of Article 11, the paragraphs 5-10 should be extended to the further risk mitigating requirements of Article 11 (1) and (2) next to the requirements of Article 11 (3).

Risk mitigation mechanisms details: Rather than imposing an obligation for parties to bilaterally agree details in order to comply with risk mitigation mechanisms such as portfolio reconciliations and dispute resolutions, the relevant RTS should focus on a unilateral obligation for financial counterparties and NFC+ to ensure these principles. The portfolio reconciliation requirements should be replaced with an obligation for FCs and NFC+ to send valuation statements to NFC- with a right for such NFC- to contest the statements, dispute resolutions should be made mandatory under EMIR referring to the methods developed by recognized industry parties without the need to pre-agree the method and timely confirmation requirements should be imposed to FCs and NFC+ solely.

The extra-territorial application of EMIR is proving very difficult, as third country entities are not aware of the EMIR regulations and are reluctant to provide information about their EMIR status (FC, NFC+, NFC-, exempted) or enter into various compliance arrangements (portfolio reconciliation, dispute resolution etc.).

Portfolio reconciliation/dispute resolution – Where both parties are required to perform a valuation (i.e. when both are either FC or NFC+) the results will often not be identical. However, such differences in the valuation does and should not constitute a material discrepancies triggering a dispute resolution process since the differences in valuation may be based on differences in the risk management system applied by the relevant counterparties. A dispute resolution process should only be required where the differences are material (in particular, where the deviation cannot be explained).

To avoid any confusion and uncertainty it could be helpful to expressly confirm that the risk mitigation requirements only entail the elements which are expressly mentioned in the relevant provisions namely:

- Timely conformation
- Portfolio reconciliation
- Dispute resolution mechanisms
- Procedures to assess whether portfolio compression is merited and possible.

2.5 – Exchange of Collateral

i. Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

EBF Members generally indicate that they expect impediments or unintended consequences with respect to meeting the future obligations to exchange collateral in accordance with Article 11(3) under EMIR.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Although the relevant obligations are not yet in force and there is thus no practical experience to build on, EBF expects that the margin requirements will have very far reaching consequences. It is already clear that the new obligations will require fundamental changes to existing collateral management practice and the contractual framework. The timely implementation of these changes will be extremely challenging, even considering the recent extension of the timeline.

Some of the original serious concerns over the potential extraterritorial scope of the obligations (application in relation to third country entities) and certain operational questions (need to formally opt-out) appear to have been addressed in the recent second consultation paper .

Nevertheless, the general issues regarding the personal and material scope of the obligations (definition of derivatives, treatment of third country entities etc.) do of course, have an impact in the context of margin requirements and can have very serious unintended consequences.

EBF Members indicate there are significant problems in cross-border transactions with different legal regimes and also different definitions and requirements (type of collateral, margins).

Derivatives users with a small hedging portfolio, including FCs, usually do not have any collateral arrangements in place. The task of implementing the margining requirements is likely to prove complex and costly. They may prefer refraining from trading non-cleared derivatives. The EBF also notes the Financial Counterparty (FC) customers will be expected to post bilateral collateral for uncleared trades in the future. Not all FCs have resources / teams in place to post daily variation margin as required by EMIR. This may result in additional barriers for such entities to execute hedging derivatives. This could be addressed by introducing FC derivative volume thresholds under which bilateral collateral is exempt

For the entities used to exchange bilateral margin as of today, the plans for margining implementation have showed that the changes required are much more complex and costly than originally anticipated. The stated intention was to reproduce the standard market practices and existing margining infrastructure in creating the mandatory margining regime. However, the current processes, systems and documentation are not in line with the proposed draft RTS in consultation. Many of the seemingly simple and small requirements have a huge impact on the current operational and documentary set-up (e.g. monitoring the collateral eligibility criteria). Others require large scale changes already (e.g. initial margin modelling).

We welcome the postponement of the implementation date in line with the BCBS IOSCO recommendations. However, there should also be a reasonable timeframe between the announced implementation dates and the publication of the implementing rules (RTS). The margining RTS are still not in place.

The cross-border inconsistencies are of a major concern for the industry. The US and EU margining rules are not in line (8 pct. FX haircut, wrong way risk, concentration limits, in-scope transaction types, in-scope entities, eligible collateral types, positon as to the use of cash IM in absence of re-investment etc.), thus deepening market fragmentation. The cross border regulatory dialogue is essential to preserve the global derivatives market.

Some requirements are not realistic in light of the existing framework and infrastructure. For example, there are major incompatibilities between the current custody arrangements and segregation requirements for initial margin. The regulatory requirements need to be in line with the operational feasibility.

The re-documentation process (negotiation and agreement of new collateral arrangements) will certainly be very time consuming and will in all likelihood result in very considerable burdens=. For example, the exchange of data required for compliance with the phase-in arrangements (e.g. notional amounts etc.) will come at the high operational and resources cost.

- Application of Margin and segregation requirements where legal effectiveness of netting or segregation agreements cannot be ensured

The issue of the need for the permission to apply alternatives to the (reciprocal) collateralisation and segregation requirements in the event netting and/or segregation agreements may not be sufficiently enforceable in relation to counterparties from a certain jurisdiction has already been raised in many of the responses to the recent second EBA/ESMA/EIOPA consultation paper on the risk mitigation techniques for OTC-derivatives not cleared by a CCP.

We believe that this issue is so important that it needs to be addressed by an amendment in the substantive provision of Art. 11 (3) EMIR. In particular, it should be considered to provide for an exemption from margin requirements under certain circumstances (i.e. threshold/risk based). At least it should be expressly confirmed that alternative approaches to collateralisation and segregation are permissible under certain circumstances (with the understanding that the counterparties will need considerable flexibility and may have to deviate significantly from the prescribed margin and segregation requirements in this connection). We further refer to the general need for a greater harmonisation of the legal framework for the protection of netting agreements (see below)

2.6 – Cross-Border Activity in the OTC derivatives markets

(a) i. With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

Avoidance of duplicative and conflicting rules when two non-EEA branches of two EEA entities into derivative transactions:

Industry is deeply concerned with the application in practice of Article 13, and specifically the lack of any equivalence decisions by the Commission. A mechanism to avoid duplicative or conflicting rules on the international application of principles laid down in Articles 4, 9, 10 and 11 is necessary to ensure that entities do not have to comply with two separate regimes to fulfil the same regulatory requirements in two jurisdictions. This will be particularly problematic in the context of the clearing obligation and margin requirements for non-centrally cleared OTC derivative trades (as discussed below). The market uncertainty associated with the cross-border application of rules would be ameliorated to a large extent if the necessary Article 13 determinations were made.

An implementing act of equivalence should be possible for transactions between two non-EEA branches of EEA banks. Especially in these situations a mechanism is needed to avoid duplicative and conflicting rules. Therefore we propose to delete the restriction on possible equivalence as mentioned in Article 13 (3) last part commencing with "where……".

Equivalence requirements intragroup transactions:

The Article 13 equivalence requirements referred to in Article 3, needed to obtain exemptions for the clearing/margin requirements for intragroup transactions between an EEA entity and a non-EEA entity has no raison d'être. Intragroup transaction exemptions should be subject to the demonstration of certain conditions (centralised risk management, etc.) but the equivalence requirements have no purpose with regards to the prevention of systemic risk.. Generally entities enter into back-to-back intragroup transactions or other intragroup transactions in order to precisely centralize the treasury and market risks with a parent entity or affiliated entity. No differences of treatment should apply between EEA and non-EEA intragroup transactions in respect of exemptions. Therefore we propose to introduce a three year transitional period for intragroup transactions involving a non-EEA entity. This should give the European Commission sufficient time to consider the necessary Article 13 equivalency determinations.

Extra-territorial impact EMIR:

EMIR has a considerable extra-territorial impact. However until the moment the rules regarding equivalence are crystallised by the European Commission, it could be argued that EMIR should solely apply to EEA parties. The first step should obviously be the EEA and when equivalence is crystallised then applying it to non-EEA parties transacting with EEA parties. At least it is arguable that the extra-territorial effect should be implemented within a longer term than for EEA parties. Therefore we propose to have a grace period of at least 3 years (or earlier when equivalence decisions have been taken) for transactions entered into between EEA and non-EEA parties to ensure legal certainty and a global level playing field.

We urge the Commission to consider industry concerns on this pressing issue and treat the Article 13 process as a priority. If equivalence under Article 13 is not addressed in an urgent manner, market fragmentation is likely to result as market participants in the EU and third countries will be unable to enter into cross-border transactions in a way where both can fulfil their regulatory requirements.

Equivalence requirements on an outcomes-focused basis:

In connection with the extra-territorial impact, it is impossible that rules will precisely be the same on a global basis due to detailed local laws and regulations. Consequently the equivalence recognition should apply on a regime-by-regime basis and not on a rule-by-rule basis to facilitate the equivalence procedures.

Alignment of certain definitions on a global basis:

The obligations are currently interpreted in such a way that they are to be applied extraterritorially, either by not permitting a one-sided application or requiring the addressees of the obligations to impose them on their third country counterparties by contractual means. Practical examples are:

- The reporting requirement: Obligation to report the identity of a third country counterparty even where this may conflict with applicable local bank secrecy or privacy law.
- The requirement to demand an LEI from third country counterparties for TR-reporting purposes.
- The need to impose the risk mitigation requirements (timely confirmation, portfolio reconciliation) on third country counterparties (where equivalent to FC and NFC) by contractual means.

We welcome the change included in Article 2 GEN of the revised draft RTS on non-cleared margin requirements which clarify the treatment of third country entities which would be an NFC- if established in the EU.

(b) i. Are there any provisions within EMIR that create a disadvantage for EU counterparties over non-EU entities?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

All of the aspects mentioned in the response to question 2.6 (a) constitute a competitive disadvantage for EU-counterparties in the international market since their competitors do not need to impose similar obligations on their clients. These disadvantages could be significantly reduced by permitting a one-sided compliance with the EMIR-obligations /not requiring the imposition of EMIR obligations on third country counterparties both regarding reporting and risk mitigation requirements.

Margining rules – In general, the requirement to collect collateral from a third party FC/NFC+, particularly coupled with the segregation obligation and restrictions on re-use, will disadvantage the EU based entities to the advantage of third country entities not required to collect margin. Trading derivatives with EU based entities will therefore become more expensive and more cumbersome unless and until all other countries implement the similar regulations. Even then, the discrepancies between the regimes will create scope for regulatory arbitrage in favour of the entities subject to a less stringent regulatory regime.

2.7 – Transparency

i. Have any significant ongoing impediments arisen to ensuring that national competent authorities, international regulators and the public have the envisaged access to data reported to trade repositories?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

The reporting services from Trade Repositories and reconciliation between different Trade Repositories have proven not to be as efficient as it should have been. In addition the services provided by Trade Repositories are costly services and the fees and services may be subject to unilateral and inequitable amendments for reporting parties. E.g. recently clients of a TR have been confronted with a 100 % rise of fee starting immediately.

Global database with LEI information:

The LEI requirements and generation has proven to be the source of many difficulties and challenges and needs to be reviewed. (See also previous sections on this issue)

Confidentiality, data protection and bank secrecy obligations that may conflict with reporting obligations are still unsolved at international level. It is urged that the conflicting rules should be resolved between regulators at international level for parties to be able to report and comply with their local requirements without the risk of incurring fines due to local confidentiality, data protection and bank secrecy rules. Until the problems are resolved parties should be able to omit sensitive data (masking).

2.8 – Requirements for CCPs

(a) i. Are there any significant ongoing impediments or unintended consequences with respect to CCPs' ability to meet requirements in accordance with Titles IV and V of EMIR?

Yes.

ii. If your answer to (i) is yes, please provide evidence or specific examples. How could these be addressed?

Considering the liquidity worries for the cleared world, the ESMA should be granted the right to suspend or terminate the clearing obligation in case of stress situations, liquidity squeeze (de-listing).

(b) i. Are the requirements of Titles IV and V sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants?

ii. If your answer to i. is no, for what reasons? How could they be improved?

(c) i. Are there any requirements for CCPs which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?

Yes.

ii. If your answer to i. is yes, which requirements and how could they be better defined?

We are not aware of any unintended impediments for EU CCPs to obtain authorisation in accordance with Title Iv and V of EMIR.

Concerning the provisions of Title IV:

Concerning liquidity risk controls, robust arrangements to ensure the continuity of CCP critical services are essential also form the point of view of proofing the CCP against non-default related crisis. CCP liquidity arrangements should go beyond the eventuality of a member default as currently foreseen in Art. 44 EMIR. In respect of Art. 32 of the EMIR implementing regulation we suggest the following revisions:

- Art. 32(3)(b): CCPs should assess their liquidity needs for the eventuality of default related stress as well as non-default related stress. In this vein, CCP liquidity needs assessment should be akin to the assessment of the costs of maintaining the critical services for a sufficient period of time, and not only on a daily or intraday basis. Such approach shall require a more sophisticated approach to the assessment of the CCP liquidity needs than the one currently required under Art. 44 EMIR and Art. 32 of the EMIR implementing regulation;

- Art. 32(3)(c): the assessment of liquidity needs should extend beyond the daily CCP liquidity needs;

Concerning transparency and disclosures to the users, in line with the answer to question 1.5 above, more transparency concerning margin methodologies, stress testing, DF modelling and concentration limits, would improve the ability of the clearing members to assess and manage the risks towards the CCP and towards the clients. In particular, margin methodology should be sufficiently predictable and understandable to the clearing members. In the same vein, CCPs should provide their users with more information concerning their investment policy, so as to allow the users to assess the risks associated therewith. We recall that the representatives of the CCP users represented in CCP risk committees are there in the in personal capacity. Consequently, they are usually bound by a non-disclosure obligation vis-à-vis their own establishment, as they are expected to defend/represent the interests of the CCP and not to represent the interests of their establishments = the CCP user.

In terms of stress-testing, a more prescriptive approach would be needed, so as to ensure that CCPs consider sufficiently conservative time horizons, relevant historical and hypothetical data, and that the stress-testing methodologies are relevant in the context of the product and/or segment subject to test. We believe, however, that stress testing requirements for CCPs should be rules-based, so as to allow the CCPs to construct a stress-test models most appropriate to the services provided and the risk profile represented by those services.

Concerning CCP investment policy and highly secured arrangements for the deposit of financial instruments and cash, exposure limits should apply for the re-investment of the cash or financial instruments in accordance with the provisions of Art. 39(8), Art. 47(1) of EMIR and Art. 44(3) of the implementing regulation. Such limits should not apply to deposits made with central banks. Since Art. 47(1) EMIR requires that any re-investment bear only a minimal market risk, CCPs should have the possibility of opening an investment account with a central bank for the financial instruments it receives. This would additionally reinforce the robustness of the CCP liquidity and allow the CCP to renounce to commercial type repo operations in order to access liquidity.

Highly secure arrangements for the deposit of assets received as collateral and default fund contribution [Art. 47(3) 468/2012 and 44 153/2013]:
The EBF believes the European Commission should indicate that CCPs should have the option to either deposit the assets received as collateral and DF contributions within a direct account at an SSS, or use a highly secured arrangement, such as depositing the said assets at an SSS via a securities account operated in the name of the CCP.

First, there is no difference from the point of view of asset protection whether the assets are deposited directly by the CCP in a direct access account or in a segregated account operated at the SSS for the CCP by a custodian bank. In both cases, the assets deposited by the CCP are clearly segregated, protected from any third party claims, and benefit from the protections under the Settlement Finality Directive, primarily the irrevocability of transfers.
Second, the duty for a CCP to use exclusively a direct account at an SSS actually results in additional risks and adds complexities to the process of transfer and management of collateral:

- posting collateral to the CCP still requires the involvement of a transfer agent and a transfer account at the level of that particular SSS that the CCP has selected. This impedes the immediacy of transfer and the efficiency of substitution, and results in higher transaction risks and operational costs for derivatives users.
- similarly to problems faced by users to post collateral, CCPs cannot renounce to the use of global custodians: no single (European or other) SSS can ensure universal access of a CCP to collateral deposited worldwide. In practical result, CCP have to use global custodians to manage collateral transfers between multiple CCP direct accounts at various locations. This practical consequence effectively defies the presumed objective that CCP should manage to rely only on own direct custody account. At the same time, the lack of harmonisation in the settlement practices between various SSS makes the use of global custodians essential in order to ensure collateral liquidity.

Finally, an SSS has to be able itself to offer global custody services in order to be able to operate a direct account for a CCP. Only 2 EU SSS are capable of providing such services, which gives them an undue competitive advantage over others. This would be redressed by ensuring that a CCP may rely on a custodian bank operating an account for it at an SSS. In addition, such concentration of risk within only two entities is unwanted and should be discouraged by providing for more options and a more level playing field among the European CSDs.

Concerning the provisions of Title V (interoperability):
At this stage there is insufficient practical experience with interoperability for derivatives to reveal concrete examples for the need to amend the provisions of Title V.

2.9 – Requirements for Trade Repositories

i Are there any significant ongoing impediments or unintended consequences with respect to requirements for trade repositories that have arisen during implementation of Titles VI and VII of EMIR, including Annex II?

Yes.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

EBF members request the removal of the field “Confirmation Date Time” of the reporting to trade repositories in order to avoid duplication with the Article 12(4) of the Commission Delegated Regulation (EU) No 149/2013 where it says that Financial Counterparties shall have to report on a monthly basis to the competent authority the number of unconfirmed OTC derivative transactions.

2.10 – Additional Stakeholder Feedback

i. Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation?

Yes, the EBF believes there are ongoing impediments or unintended consequences in particular in the area of the interrelation between EMIR and other regulatory initiatives.

We also note that there are difficulties and challenges in complying with multiple international regulatory regimes for OTC derivatives. The issue seems rather one of lack of international/global cooperation and recognition of the various regulators rather than impediments with any specific EMIR provisions.

The EBF also believes the European Commission and ESMA should have the power to publish temporary no-action letters when it is obvious that parties will not have the capacity to comply with EMIR on a timely basis.

ii. If your answer to i. is yes, please provide evidence or specific examples. How could these be addressed?

Examples for impediments resulting from deficiencies in the interrelation between EMIR and other regulatory initiatives:

- CRR capital requirement for client clearing/ leverage ratio

The capital requirements concerning CCP-traded transactions both from the perspective of a CM or a client under the CRR and the leverage ratio requirements effectively disincentivise CCP-clearing and offering of clearing services as a CM.

- BRRD

There is some remaining uncertainty to what extent CCP cleared transactions may be affected by resolution measures since

- there is only a limited exemption for settlement systems and s
- it is – as of today – not entirely clear whether these transactions fall under the exemption for "secured liabilities".

In order to avoid any uncertainty, it should be clarified that CCP-transactions (both the transactions between the client and the CM and the CM and the CCP) are indeed exempted from any resolution measure.

- SFT

The EBF is of the opinion that the future reporting requirements under the SFT may overlap to some extent with EMIR-requirements.

- Financial Collateral Directive /netting

In view of the importance of the effectiveness of netting agreements both in the context of clearing as well as non-cleared transactions, we see a clear need for further harmonisation of the legal framework for the protection of netting agreements in the EU.

The multiplication of the data and information to be exchanged between the market participants in order to comply with EMIR: various parts of EMIR have been implemented at various points in time and caused multiple exchanges of data or status information between counterparties. At each stage, different criteria are being used to determine compliance dates or scope of various requirements. This results in considerable administrative and operational burdens as the collected data needs to be consumed in internals systems. To reduce the burden, the various thresholds and criteria need to be aligned as much as possible in order to permit counterparties to rely on available data and avoid the need to obtain and process very similar information for separate purposes.

Additionally, the phase-in criteria used in EU should be coordinated with the criteria used in US and other major jurisdictions. Currently, there are slight differences in the methodology for calculation of the phase-in trigger levels in EU and EUR. Moreover, the currency movements may cause the EUR based figures to fluctuate between the calculation date, disclosure date and compliance date.